STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANISE BASON,

Defendant-Appellant.

UNPUBLISHED
August 30, 2002

No. 230157
Wayne Circuit Court
LC No. 99-003035

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right her bench trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to a term of eighteen to fifty years' imprisonment. We affirm.

Defendant first claims that she was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must '"show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v Johnson,* 451 Mich 115, 122; 545 NW2d 637 (1996), quoting *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), quoting *Strickland v Washington,* 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 1984). A defendant must also overcome the strong presumption that the challenged action is sound trial strategy. *In re Ayres,* 239 Mich App 8, 21; 608 NW2d 132 (1999).

Defendant contends that counsel's failure to present any defense on her behalf, where there was evidence to support a heat of passion, battered wife syndrome, or diminished capacity theory, amounted to ineffective assistance of counsel. We disagree. Following the prosecution's case in chief, the trial court conducted a *Walker*[1] hearing and suppressed the statement that defendant made to the police on the basis that defendant did not make the statement voluntarily because she was highly medicated when she spoke with the police. The statement included

[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

possible evidence that could be damaging to defendant regarding premeditation. Thereafter, defense counsel rested without presenting any witnesses on her behalf. At the *Ginther*[2] hearing, defense counsel testified that she rested because she believed that the prosecution failed to prove second-degree murder and that defendant would prevail on a theory of accident. Defendant did not testify at the *Ginther* hearing.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *Ayres, supra* at 22. A counsel's failure to raise a substantive defense where there is substantial evidence to support the defense may amount to ineffective assistance of counsel. *People v Moore,* 131 Mich App 416, 418; 345 NW2d 710 (1984). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *Ayres, supra.* A substantial defense is one that "might have made a difference in the outcome of the trial." *Id.* However, "[t]his Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires." *Id.*

First, defendant has not shown that she made a good-faith effort to avail herself of the right to present these defenses. Although the record indicates that defendant initially asserted her right to these particular defenses, the record also indicates that she acquiesced in defense counsel's decision to pursue a defense theory of accident. Therefore, defendant's claim of ineffective assistance of counsel fails in this respect. Furthermore, defendant failed to demonstrate that a defense theory of diminished capacity, battered wife syndrome, or heat of passion was a "substantial defense" in that they may have affected the outcome of the trial. *Ayres, supra*.

First, although a psychologist who testified at the *Walker* hearing concluded that defendant suffered from a diminished capacity at the time of the accident and was not criminally responsible, defense counsel properly concluded that a diminished capacity defense was implausible in this case. A defense of diminished capacity is not a defense to second-degree murder, a general intent crime. *People v Biggs,* 202 Mich App 450, 454; 509 NW2d 803 (1993). Thus, because diminished capacity is not a defense to second-degree murder, defendant was not denied the effective assistance of counsel by defense counsel's failure to assert this defense.

Defendant also failed to show that a theory that she acted in self-defense because she suffered from the battered spouse syndrome may have made a difference in the outcome of the trial. *Ayres, supra*. Expert testimony on the battered spouse syndrome is generally offered by a defendant in a homicide case when the defendant claims self-defense. *People v Christel,* 449 Mich 578, 589; 537 NW2d 194 (1995). The Court, recognizing that testimony regarding the battered spouse syndrome has been used "to explain the reasonableness of the battered spouse's perception that danger or great bodily harm is imminent," has permitted the introduction of battered spouse syndrome evidence to support a claim of self-defense. *People v Wilson,* 194 Mich App 599, 602-604; 487 NW2d 822 (1992). "[A] homicide is justified under the theory of self-defense if the defendant 'honestly and reasonably believes that his life is in imminent danger

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[2] *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

or that there is a threat of serious bodily harm.'" *Id*. at 602, quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

To admit expert testimony regarding the battered spouse syndrome, there must be a factual premise allowing a reasonable trier of fact to infer that the defendant could be a battered spouse. *Christel, supra* at 592-593 n 27. While there may have been evidence of physical fights with Bryant in the past, the existing record does not establish that defendant honestly or reasonably believed she was in imminent danger of death or great bodily harm sufficient to establish a claim of self-defense. Nothing in the record shows that defendant killed Bryant because she feared for her life or that her state of mind was so affected by systematic and continual spousal abuse characteristic of the battered spouse syndrome that she feared some imminent harm by Bryant. To the contrary, trial testimony indicated that before the killing, defendant had on many occasions sought out Bryant, was violent toward him, threatened him, and repeatedly said that she was going to kill him. Significantly, on the night before the killing, defendant contacted Bryant. He came to her house, treated her well, and did not abuse her. Moreover, a review of the record indicates that the alleged abuse did not provoke defendant. Rather, the provocation stemmed from a phone call defendant made to another woman on the morning of the killing.

In sum, we conclude that the requisite factual premise did not exist to allow a reasonable trier of fact to infer that defendant feared Bryant. Expert testimony regarding the battered spouse syndrome would not have been relevant because the facts do not suggest that defendant killed Bryant in self-defense. Therefore, testimony about the syndrome would not have affected the outcome of the trial even if offered by defense counsel. Thus, defendant failed to demonstrate that she was denied the effective assistance of counsel on this ground. *Ayres, supra*.

In addition, defendant failed to demonstrate that the outcome of the trial may have differed had defense counsel pursued a "heat of passion" theory. *Id.* The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." MCL 750.321; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). The trial judge, sitting as the finder of fact, found that the facts did not justify mitigating murder to manslaughter.

The provocation necessary to mitigate murder to manslaughter is that which would cause a reasonable person to lose control and act out of passion rather than reason. *Sullivan, supra* at 518. The determination of what is adequate provocation is a question of fact for the trier of fact. *Id*. The trial judge found that the emotional excitement had been going on for a long time, there were arguments back and forth, and Wynter and defendant had been talking on the phone for some time, and concluded that she had "no idea what had happened just prior to the time that the defendant put her foot on that gas and revved that car up." Evidently, the court found the record devoid of evidence regarding adequate provocation.

There were no witnesses other than defendant who could testify regarding what occurred before the killing. In concluding that the facts did not warrant a finding of manslaughter, the court emphasized that the couple had been arguing for quite some time and that defendant knew of Bryant's relationship with Wynter. Nothing in the record indicates that anything, other than

the same situation she had been coping with for a lengthy period, compelled defendant to go in search of Bryant.[3]

Furthermore, the trial court concluded that, even if they had an argument before defendant hit Bryant, sufficient time had passed to constitute a "cooling off" period during which time a reasonable person could control her passions. Throughout the sequence of events, defendant had time to take a second look before she acted. Trial evidence indicated that Wynter received a voice mail message from Bryant around 9:00 or 10:00 a.m. Thereafter, Bryant walked down the street on the sidewalk toward the house where Wynter was staying, which happened to be a house in the vicinity of defendant's home. As Bryant was walking on the sidewalk, defendant's vehicle jumped the curb and hit Bryant at approximately 10:30 a.m. In sum, we find that defendant failed to demonstrate that the outcome of the trial may have differed had defense counsel pursued a "heat of passion" theory.

Defendant also contends that defense counsel's failure to move for a directed verdict constitutes ineffective assistance of counsel. In deciding whether to grant a motion for a directed verdict, the court must evaluate the evidence in the light most favorable to the prosecution. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Defendant was not prejudiced by defense counsel's failure to move for a directed verdict because the court, at the *Ginther* hearing, indicated that a motion for a directed verdict would not have affected the outcome of the trial, because there was "entirely too much evidence for a . . . directed verdict."

Given the compelling evidence against defendant in this case, defense counsel was faced with a choice among several weak defenses. The record indicates that defense counsel acted diligently in this case. She interviewed possible witnesses, communicated with defendant on a regular basis, and investigated the plausible defense theories. At the *Ginther* hearing, defense counsel explained that she considered several defenses. When she rested, she thought that she had won on the theory of accident and that the prosecution had failed to prove its case as to second-degree murder. She also testified that based on the evidence and the judge's comments in chambers, that the judge did not believe any of the prosecution witnesses. Hence, she was certain she should rest at that time. Her explanations indicate that counsel made a strategic decision to proceed on an accident theory and not to pursue the alternate theories. The fact that defense counsel's strategy did not work does not render its use ineffective assistance of counsel. *Ayres, supra.* Although defense counsel testified that she should have taken a break before she rested, this Court does not assess counsel's performance with the benefit of hindsight. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999).

Although there may have been evidence to support alternate defenses, we find that defendant failed to assert her right to such defenses or establish that those defenses were substantial such that they might have made a difference in the outcome of the trial. *Ayres, supra*.

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[3] Contrary to defendant's argument, the fact that defendant may have suffered from a diminished capacity at the time of the killing is irrelevant because provocation is measured under a reasonable person standard. As such, defendant's special mental qualities are not considered in measuring whether the provocation was adequate. *Sullivan, supra* at 519.

Therefore, defense counsel's performance did not fall below an objective standard of reasonableness. *Pickens, supra* at 303.

Defendant next claims that her sentence was disproportionately harsh. Because the crime occurred after January 1, 1999, defendant was subject to the statutory sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). The guidelines established a minimum sentence range of 162 to 270 months. MCL 777.21; MCL 777.61. Defendant's minimum sentence of 216 months was within the statutory guidelines range. Because defendant's minimum sentence was within the guidelines and defendant does not contend that the court erred in scoring the guidelines or relied upon inaccurate information at sentencing, further review of defendant's sentence is precluded. MCL 769.34(10). *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). When a minimum sentence falls within the appropriate guidelines range, this Court must affirm that sentence. MCL 769.34(10); *Babcock, supra*.

We affirm.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey